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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 NANCY ROBINSON, ) NO. CV 12-10285-E  
12 )  
13 Plaintiff, )  
14 )  
15 v. ) MEMORANDUM OPINION  
16 )  
17 CAROLYN W. COLVIN, ACTING ) AND ORDER OF REMAND  
18 COMMISSIONER OF SOCIAL SECURITY,<sup>1</sup> )  
19 )  
20 Defendant. )  
21 )  
22 )  
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18  
19 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
20 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
21 judgment are denied and this matter is remanded for further  
22 administrative action consistent with this Opinion.

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26 \_\_\_\_\_  
27 <sup>1</sup> Carolyn W. Colvin, who became Acting Commissioner of  
28 Social Security as of February 14, 2013, is hereby substituted as  
Defendant in this matter. See Fed. R. Civ. P. 25(d)(1); 42  
U.S.C. § 405(g).

1 **PROCEEDINGS**

2

3 Plaintiff filed a complaint on December 3, 2012, seeking review

4 of the Commissioner's denial of disability benefits. The parties

5 filed a consent to proceed before a United States Magistrate Judge on

6 January 8, 2013. Plaintiff filed a motion for summary judgment on

7 June 26, 2013. Defendant filed a cross-motion for summary judgment on

8 August 26, 2013. The Court has taken the motions under submission

9 without oral argument. See L.R. 7-15; "Order," filed December 6,

10 2012.

11

12 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

13

14 Plaintiff, a former physical fitness instructor, asserts

15 disability since March 2, 2002, based on a combination of alleged

16 physical impairments (Administrative Record ("A.R.") 40-97, 102-04,

17 257-58, 283, 333). Plaintiff's last insured date was September 30,

18 2006 (A.R. 122).

19

20 The Administrative Law Judge ("ALJ") determined that Plaintiff

21 suffers from "the following severe impairments: degenerative disc

22 disease involving the cervical and lumbar spine and migraine

23 headaches" (A.R. 123). The ALJ found that, through the date last

24 insured, Plaintiff retained the residual functional capacity to

25 perform light work, "except that [Plaintiff] could perform occasional

26 overhead reaching and perform all postural activities occasionally."

27 (Id.).

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1 Administration used correct legal standards. See Carmickle v.  
2 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008). Substantial  
3 evidence is "such relevant evidence as a reasonable mind might accept  
4 as adequate to support a conclusion." Richardson v. Perales, 402 U.S.  
5 389, 401 (1971) (citation and quotations omitted); see Widmark v.  
6 Barnhart, 454 F.3d 1063, 1067 (9th Cir. 2006).

### 7 8 DISCUSSION

9  
10 The ALJ's decision mischaracterizes the vocational expert's  
11 testimony. Contrary to the ALJ's decision, the vocational expert did  
12 not testify that "a hypothetical claimant with [Plaintiff's] residual  
13 functional capacity would be able to perform [Plaintiff's] past  
14 relevant work as generally and actually performed." In fact, the  
15 vocational expert was never asked whether a hypothetical claimant with  
16 Plaintiff's residual functional capacity, including her limitations on  
17 overhead reaching and postural activities, would be able to perform  
18 Plaintiff's past relevant work as generally and actually performed.

19  
20 Where, as here, a hypothetical question fails to "set out all of  
21 the claimant's impairments," the vocational expert's answers to the  
22 question cannot constitute substantial evidence to support the ALJ's  
23 decision. See, e.g., DeLorme v. Sullivan, 924 F.2d 841, 850 (9th Cir.  
24 1991); Gamer v. Secretary, 815 F.2d 1275, 1280 (9th Cir. 1987);  
25 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984); see also  
26 Social Security Ruling 96-8p (in assessing residual functional  
27 capacity, the ALJ must consider all limitations imposed by all  
28 impairments, even non-severe impairments; "the limitations due to such

1 a 'not severe' single impairment may prevent an individual from  
2 performing past relevant work . . ."); 20 C.F.R. § 404.1545(e) ("we  
3 will consider the limiting effects of all your impairment(s), even  
4 those that are not severe, in determining your residual functional  
5 capacity"); accord Carmickle v. Commissioner, 533 F.3d at 1164. The  
6 ALJ thus erred by failing to include all of Plaintiff's limitations in  
7 the hypothetical question and by mischaracterizing the vocational  
8 expert's testimony. Id.; see also Regennitter v. Commissioner, 166  
9 F.3d 1294, 1297 (9th Cir. 1999) (materially "inaccurate  
10 characterization of the evidence" warrants remand); Lesko v. Shalala,  
11 1995 WL 263995, at \*7 (E.D.N.Y. Jan. 5, 1995) (same).

12  
13 Defendant does not appear to contest the fact that the Dictionary  
14 of Occupational Titles ("D.O.T.") describes the job of physical  
15 fitness instructor as requiring, inter alia, frequent (rather than  
16 occasional) stooping, crouching and reaching (Defendant's Motion at 3-  
17 4; see D.O.T. 153.227-014). Defendant argues, however, that the Court  
18 should uphold the administrative decision because: (1) Plaintiff  
19 assertedly reported that her past relevant work as actually performed  
20 did not require "any postural activities"; and (2) the ALJ found  
21 Plaintiff could perform her past relevant work as "actually" performed  
22 (Defendant's Motion at 3-4).

23  
24 Contrary to Defendant's argument, the Court is unable to conclude  
25 that the errors described above were harmless. "[A]n ALJ's error is  
26 harmless where it is inconsequential to the ultimate non-disability  
27 determination." Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)  
28 (citations and quotations omitted). "[W]e must analyze harmlessness

1 in light of the circumstances of the case." Id. at 1121 (citations  
2 and quotations omitted).

3  
4 [D]espite the burden to show prejudice being on the party  
5 claiming error by the administrative agency, the reviewing  
6 court can determine from the circumstances of the case that  
7 further administrative review is needed to determine whether  
8 there was prejudice from the error. Mere probability is not  
9 enough. But where the circumstances of the case show a  
10 substantial likelihood of prejudice, remand is appropriate  
11 so that the agency can decide whether re-consideration is  
12 necessary. By contrast, where harmlessness is clear and not  
13 a borderline question, remand for reconsideration is not  
14 appropriate.

15  
16 McCleod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011).

17  
18 It is true that an ALJ need not always consult a vocational  
19 expert to find that a claimant can perform the claimant's past  
20 relevant work. See Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir.  
21 1993); Miller v. Heckler, 770 F.2d 845, 850 (9th Cir. 1985). In the  
22 present case, however, the ALJ expressly relied on (and  
23 mischaracterized) the vocational expert's testimony in concluding that  
24 Plaintiff could perform her past relevant work as generally and  
25 actually performed (A.R. 128). In the absence of any usable testimony  
26 from the vocational expert, it is uncertain what evidence the ALJ  
27 would have consulted, and what conclusion the ALJ would have reached,  
28 in the vocational analysis.

1 If it were clear on the present record that even a person with  
2 significant reaching and postural limitations could perform the job of  
3 physical fitness instructor as Plaintiff actually performed that job,  
4 perhaps the Court could deem the ALJ's errors harmless. As discussed  
5 below, however, the record is unclear in this regard.

6  
7 As Defendant points out, Plaintiff apparently reported that in  
8 her past relevant work she "taught fitness classes such as aerobics,  
9 weight training, for Senior Citizens and students" without doing any  
10 sitting, climbing, stooping, kneeling, crouching, crawling or reaching  
11 (A.R. 283). Yet, Plaintiff also apparently reported that her past  
12 relevant work required "being physically fit, doing demonstrations of  
13 physical activity, the use of weight machines, laying [sic] on mats  
14 [on] the floor demonstrating balance and strength skills" (A.R. 333).  
15 Furthermore, Plaintiff testified that in her past relevant work she  
16 taught fitness "by example," "stretching, dancing, jumping, floor work  
17 . . . bending knees," and strengthening the upper body through  
18 repetitive hand weight exercises, including lifting the hand weights  
19 overhead (A.R. 59-61). Plaintiff testified that her "floor work"  
20 entailed getting on her hands and knees as well as on her back, and  
21 that her job required continuous movement (such as running in place)

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1 for 35 minutes nonstop (A.R. 61-62).<sup>2</sup> Absent further development,<sup>3</sup>  
2 the record plainly does not support a confident conclusion that a  
3 person with any significant reaching or postural limitations could  
4 perform the job of physical fitness instructor as Plaintiff actually  
5 performed that job.

6  
7 The appropriate remedy in the present case is a remand for  
8 further administrative proceedings, rather than a reversal with a  
9 directive for the payment of immediate benefits. See INS v. Ventura,  
10 537 U.S. 12, 16 (2002) (upon reversal of an administrative  
11 determination, the proper course is remand for additional agency  
12 investigation or explanation, except in rare circumstances). Contrary  
13 to Plaintiff's argument, it is unclear on the present record whether a  
14 person with Plaintiff's residual functional capacity could perform her  
15 past relevant work as she actually performed it (see A.R. 283).

16  
17 Plaintiff's request that the case be assigned to a different ALJ  
18 is denied. Plaintiff has not carried her considerable burden of  
19 demonstrating judicial bias. See Liteky v. United States, 510 U.S.  
20 540, 555 (1994) ("judicial rulings alone almost never constitute a  
21 valid basis for a bias or partiality motion . . . judicial remarks  
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23 <sup>2</sup> The ALJ found some of Plaintiff's testimony not fully  
24 credible, but did not address the credibility of Plaintiff's  
25 testimony regarding the requirements of her past relevant work  
(A.R. 123-28).

26 <sup>3</sup> "The ALJ has a special duty to fully and fairly develop  
27 the record and to assure that the claimant's interests are  
28 considered. This duty exists even when the claimant is  
represented by counsel." Brown v. Heckler, 713 F.2d 441, 443  
(9th Cir. 1983).



1 during the course of a trial that are critical or disapproving of, or  
2 even hostile to, counsel, the parties, or their cases, ordinarily do  
3 not support a bias or partiality challenge"); see also Verduzco v.  
4 Apfel, 188 F.3d 1087, 1089-90 (9th Cir. 1999) ("ALJs and other similar  
5 quasi-judicial administrative officers are presumed to be unbiased");  
6 Travis v. Sullivan, 985 F.2d 919, 924 (7th Cir. 1993) ("[s]electing a  
7 new ALJ is a decision for the [Commissioner] to make when there has  
8 been no proof of bias or partiality by the original ALJ in the case").  
9 The regrettable fact that during the administrative hearing in the  
10 present case the ALJ resorted to sarcasm while expressing his evident  
11 displeasure with the conduct of Plaintiff's counsel is insufficient to  
12 prove any bias against Plaintiff, when considered in the context of  
13 the entire record. See, id.; see also Bayliss v. Barnhart, 427 F.3d  
14 1211, 1216 (9th Cir. 2005) ("In light of the ALJ's detailed and  
15 reasoned written grounds for ruling against Bayliss, we conclude that  
16 the statements in the ALJ's opinion in which the ALJ expressed  
17 displeasure with the conduct of Bayliss's counsel are not sufficient  
18 to establish bias.") (quoting Rollins v. Massanari, 261 F.3d 853, 858  
19 (9th Cir. 2001) ("[E]xpressions of impatience, dissatisfaction,  
20 annoyance, and even anger, that are within the bounds of what  
21 imperfect men and women . . . sometimes display do not establish  
22 bias.") (internal citations omitted)).

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1 **CONCLUSION**

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3 For all of the foregoing reasons,<sup>4</sup> Plaintiff's and Defendant's

4 motions for summary judgment are denied and this matter is remanded

5 for further administrative action consistent with this Opinion.

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7 LET JUDGMENT BE ENTERED ACCORDINGLY.

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9 DATED: September 4, 2013.

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11 \_\_\_\_\_/s/\_\_\_\_\_

12 CHARLES F. EICK

13 UNITED STATES MAGISTRATE JUDGE

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27 <sup>4</sup> The Court has not reached any other issue raised by

28 Plaintiff except insofar as to determine that reversal with a

directive for the payment of benefits would not be appropriate at

this time.